IN THE

Supreme Court of the United States

October Term, 1958

No. 471

ANTHONY M. PALERMO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on August 18, 1958.

Opinion Below

The opinion of the Court of Appeals for the Second Circuit (R. 433a) has not as yet been officially reported. A copy of that opinion is appended to this petition in the Appendix at pp. 13-18.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on August 18, 1958 (R. 439a). Petitioner filed a timely petition for rehearing in the Court of Appeals on August 29, 1958 (R. 441a). The petition for rehearing was denied without opinion by the Court of Appeals on September 25, 1958 (R. 453a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Does Section 3500, Title 18, U. S. C. grant to a defendant on trial in a criminal case in a District Court of the United States the right to inspect prior oral statements made to a government agent by the principal witness for the government, relating to the same material subject matters as are testified to by the witness upon the trial when the substance of said oral statements is set forth in a memorandum prepared by the government agent and in the possession of the government at the time of trial?

2. Is the requirement in Section 3500, Title 18, U. S. C., that there must be a "substantially verbatim recital" of the witness' statement, satisfied where a government agent's memorandum sets forth the substance of one or more prior statements made to him by the principal government witness as to the same material subject matters as to which the witness testified on the trial, although the agent's memorandum does not purport to quote the exact words used by the witness?

3. Is the requirement in Section 3500, Title 18, U. S. C., that the recording by a government agent of a prior oral statement by a trial witness for the government must be "recorded contemporaneously" satisfied where the government agent's memorandum in which the substance of the witness's oral statements was recorded, was prepared on the same day and within a few hours after the interview between the agent and the witness?

4. Does Section 3500, Title 18, U. S. C., provide the exclusive relief to which a defendant is entitled with respect to prior statements made to a government agent by the principal trial witness for the government, so as to prohibit inspection by the defendant of those portions of a government agent's memorandum which set forth the substance

of oral statements made by the witness to the government agent as to the same material subject matters as were testified to by the witness upon the trial?

5. If the answer to the fourth question set forth above is in the affirmative, does Section 3500, Title 18, U. S. C., involve an unconstitutional deprivation of the defendant's right to due process of law, guaranteed by the Fifth Amendment to the Constitution of the United States, when applied so as to prohibit inspection by a defendant of prior oral statements made to a government agent by the principal witness for the government, as recorded in a memorandum prepared by the agent, relating to the same material subject matters as were testified to by the witness on the trial?

6. Under the decision of this Court in *Jencks* v. *United States*, 353 U. S. 657, is a defendant in a criminal case entitled to inspect those portions of a memorandum made by a government agent in which the agent sets forth the substance of one or more pre-trial statements made to him by the principal trial witness for the government, relating to the same material subject matters as were testified to by the witness upon the trial?

7. Does the refusal by the trial court in a criminal case to permit inspection by the defendant of those portions of a memorandum, made by a government agent of a pre-trial interview with the principal trial witness for the government, which set forth the substance of what the witness said to the agent as to the same material subject matters as were testified to by the witness upon the trial, constitute a violation of the rule laid down by this Court in *Jencks* v. *United States*, 353 U. S. 657, governing the administration of justice in the federal courts?

8. Did the Court of Appeals err in denying petitioner's application that his counsel be permitted to have access to the pertinent portions of the document in order to be able

adequately to present the defendant's rebuttal to the assertions by the government that the recording of the witness's statements to the agent was not "recorded contemporaneously", and did not constitute a "substantially verbatim recital", within the meaning of Section 3500, Title 18, U. S. C.?

9. Does the proper administration of justice in the federal courts sanction a practice which places upon a defendant the burden of establishing that a document, which defendant's counsel has, despite timely and proper application, never been permitted to see, contains a "substantially verbatim recital", which was "recorded contemporaneously", of what a government trial witness said to a government agent, where the record affirmatively shows, (a) that the witness was interviewed by the government agent prior to the trial; (b) that in the course of the interview the witness made statements to the agent relating to the same, material subject matters as were testified to by the witness upon the trial; (c) that the government agent made a memorandum of the interview on the same day and within a few hours after it was concluded; and (e) that the memorandum set forth, among other things, the substance of what the witness said to the agent on the subject matters as to which the witness testified for the government on the trial?

Statute and Constitutional Provision Involved

Section 3500, Title 18, United States Code and Amendment V to the Constitution of the United States are set forth in the Appendix at pp. 22-24.

Statement

Petitioner was tried under an indictment charging him with willful attempt to evade and defeat his federal income taxes for the years 1950, 1951 and 1952, in violation

of Section 145(b) of the Internal Revenue Code of 1939 (R. 7a-9a).

On the trial, the principal, indispensable, witness for the government was the senior partner in the firm of certified public accountants which had prepared the petitioner's federal income tax returns for some twenty-five years, including the years covered by the indictment.

On direct examination this witness testified in substance that he and his firm faithfully recorded on petitioner's returns all of the information supplied by the petitioner, adding nothing and omitting nothing, thus placing upon the petitioner sole responsibility for all errors and omissions in the returns.

Of transcendant importance was Government Exhibit 6, a list of dividends, written in petitioner's own hand, relating to dividends in a particular category received during the tax year 1951. The dividends listed on this exhibit were so substantially in excess of the total dividends in that category reported in the 1951 return that, if the jury were satisfied that petitioner had withheld the document from the witness (petitioner's accountant) conviction was altogether likely.

In substance the defense was that the petitioner signed tax returns in blank each year, delivered them to the accountant and the latter's firm, furnished to the accountant and the accounting firm all bank statements, cancelled checks, brokerage statements and other pertinent records and documents, never saw the returns before or after they were filed and had neither knowledge nor notice that the returns were incorrect in any respect. There was a very substantial amount of evidence, consisting of oral testimony from many witnesses and significant documentary evidence, to support defendant's position.

As to the vital document, Government Exhibit 6, the defendant contended that it had been delivered to the ac-

countants well prior to the preparation of the 1951 return, and that failure to include these dividend items in the return was due to carelessness or mistake on the part of the accounting firm or, what was more likely, failure of communication between the partners in the accounting firm. There was very substantial evidence supporting the defendant's position as to this document. A completely disinterested witness, called by the government itself, so testified and there was a great deal of circumstantial evidence pointing in the same direction (R. 293a, 297a).

On direct and cross-examination the witness denied that the document had been delivered to him or his firm prior to the preparation of the 1951 return. Instead he asserted that it was first delivered to him at a much later date under circumstances which, if the witness was believed by the jury, were damning in the extreme (R. 31a, 153a-155a).

Thus the truth or falsity of the witness's testimony, both in general and in particular, with respect to Government Exhibit 6, was vital to both the prosecution and the defense. If the witness's testimony could not be discredited and overcome, conviction was a virtual certainty; if it could be overcome and other evidence indicating the delivery of Government Exhibit 6 to the accountants prior to the preparation of the 1951 return survived uncontradicted, a verdict of acquittal was equally probable.

On cross-examination of the witness, the defense brought out the fact that the witness had on several prior occasions been questioned by the Internal Revenue agents who had conducted the tax investigation which led to the indictment (R. 154a). Substantial, numerous and highly material discrepancies between his prior statements and his testimony at the trial were brought out on cross-examination and explored. That the witness' trial testimony was false in some respects is shown by the record to be patent and undeniable. Whether it was false in general insofar as

it placed responsibility upon petitioner, and in particular as to the time when petitioner delivered Exhibit 6 to the witness, constituted the jury's principal questions on which the defendant's fate depended.

It appeared that on August 23, 1956 there was a conference between the witness and special agent Harper, the agent conducting the tax investigation (R. 154a). The interview lasted two hours or more. There was discussed, among other things, Exhibit 6 and the time when it was first delivered by petitioner to the witness (R. 155a). There was also discussed a highly material and important change in the witness' position as to Exhibit 6. The witness had previously given sworn testimony under oath to the effect that he did not remember the Exhibit at all and was unable to say when it had been received by him. Nor had he been able to recall whether the Exhibit had been delivered to him by the petitioner prior to preparation of the 1951 return. At the conference with special agent Harper on August 23, 1956 the witness was shown a copy of the 1951 return and called upon to compare the figures in the return with the figures in the Exhibit. He then signed and swore to an affidavit to the effect that this comparison indicated to him that the Exhibit was not delivered to him until after the preparation of the 1951 return (R. 155a-156a).

Although the defense has never been afforded an opportunity to inspect any portion of the memorandum, and although the government has, even in the proceedings in the Court of Appeals, been extremely cautious in revealing the nature of the contents of the memorandum, it has conceded that the memorandum is a lengthy one; that it was made by Special Agent Harper on the same day and within "some hours after the conclusion of the conference"; that it sets forth the substance of what the witness said to special agent Harper about Exhibit 6 and the time when it was delivered to the witness; and that it sets forth the substance of what was said by the witness in

the interview as to other material subject matters as to which the witness testified for the government upon the trial.

In the course of the cross-examination of the witness while he was being questioned about the interview with special agent Harper on August 23, 1956, the defense made a timely and appropriate motion to inspect those limited portions of Harper's memorandum which set forth what the witness had said to Harper (R. 157a). After extensive argument the motion was denied (R. 157a-165a).

The Court of Appeals affirmed. The opinion of that Court stated that Section 3500, Title 18, U. S. C. had established the exclusive standard for production of prior statements of government witnesses and that the statements demanded were not within the statute. It stated that the memorandum was not a substantially verbatim recording of the witness's statements and, although it is not clear from the opinion, apparently the court held that it was not prepared contemporaneously. It declined to consider whether Section 3500, Title 18, U. S. C., as construed by the trial court and the Court of Appeals, is in conflict with the decision of this Court in *Jencks* v. *United States, supra.* Not expressly but by necessary implication the Court of Appeals declined to follow the decision of the Court of Appeals for the Sixth Circuit in *Bergman* v. *United States,* 253 F. 2d 933, decided March 12, 1958; rehearing denied with additional opinion April 23, 1958 (*Ibid*).*

The opinion of the Court of Appeals further indicates that in considering and evaluating the decision of this Court in *Jencks* v. *United States, supra,* the Court of Appeals was greatly influenced by the assumed fact that

* Copies of the opinions of the Court of Appeals for the Sixth Circuit in that case are appended to this petition in the Appendix at pages 19-22.

Matusow and Ford, the government witnesses in that case, had, by the time this Court rendered its decision, been thoroughly discredited.

In the petition for rehearing (R. 441a) petitioner asked that his counsel be afforded an opportunity to examine the pertinent portions of the agent's memorandum in order to be able intelligently to present the defendant's side of the case. The petition for rehearing further requested clarification of the opinion of the Court of Appeals on the point of what constituted a "substantially verbatim recital" as set forth in Section 3500, Title 18, U. S. C. It also sought clarification of the opinion of the Court of Appeals on the question of when a statement is "recorded contemporaneously" within the meaning of the same section. And finally on petition for rehearing the petitioner requested the Court of Appeals specifically to consider whether the decision of this Court in *Jencks v. United States, supra* requires that petitioner be afforded the inspection sought as a matter of simple justice and fair play, having an important bearing on the administration of justice in the federal courts. The petition for rehearing also raised the question of due process of law and the applicability of the Fifth Amendment of the Constitution of the United States, as had been done in the Court of Appeals and at the trial. Rehearing was denied without opinion on September 25, 1958 (R. 452a, 453a).

Reasons for Granting the Writ

The decision below should be reviewed because:

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court; namely that Section 3500, Title 18, U. S. C. enacted September 2, 1957 "is the exclusive standard" governing the right of a defendant in a criminal case to inspect prior statements made to government agents

by witnesses called by the government, relating to subject matters as to which the witnesses testify for the government on trial.

2. The Court of Appeals has decided a second important question of federal law which has not been, but should be, settled by this Court; namely, that Section 3500, Title 18, U. S. C. prohibits the inspection by a defendant in a criminal case of those portions of a memorandum made by a government agent which set forth the substance of what was said to the government agent by a witness testifying for the government upon the trial as to the same material subject matters as are covered by the witness in his trial testimony and has so narrowly construed the statutory phrase "substantially verbatim recital" as to exclude any recording other than an actual transcript or mechanical recording.

3. The Court of Appeals has decided a third important question of federal law which has not been, but should be, settled by this Court, namely, that, although a government agent made a memorandum on the same day and within a few hours after the government witness made an oral statement to the agent, the statement was not "recorded contemporaneously" within the meaning of Section 3500, Title 18, U. S. C.

4. The Court of Appeals has decided a federal question in a way conflicting with an applicable decision of this Court; namely, it has denied to a defendant in a criminal case the right to inspect a record made by a government agent of oral statements and reports made to the agent by a witness called by the government on the trial of a criminal case in contravention of the principles laid down by this Court in *Jencks v. United States*, 353 U. S. 657.

5. The Court of Appeals for the Second Circuit has rendered a decision relating to the same statute and the

same issues in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Bergman* v. *United States*, 253 F. 2d 933.

6. The decision of the trial court, as affirmed by the Court of Appeals, has deprived the petitioner of the due process of law guaranteed to him by the Fifth Amendment to the Constitution of the United States; and

7. An authoritative construction and determination by this Court of the new federal statute, Section 3500, Title 18, U. S. C., is of special importance in order to guide the inferior federal courts in the application of the statute and to avoid unnecessary confusion and delay in trials in the federal courts.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted. It is respectfully submitted further that counsel for petitioner should be afforded an opportunity to examine the statements of the witness, as recorded by the government agent, in order that all the issues involved herein may be intelligently presented by the petitioner as well as by the government. The document in question was marked Court's Exhibit 2 upon the trial and was upon your petitioner's demand delivered to the Court of Appeals. Your petitioner has requested the Clerk of the Court of Appeals to transmit the document to this Court as part of the record.

Respectfully submitted,

WILLYS S. NEWCOMB,
JOHN A. WELLS,
Counsel for Petitioner.

APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 388—October Term, 1957

(Argued June 3, 1958 Decided August 18, 1958.)

Docket No. 25085

UNITED STATES OF AMERICA,
Plaintiff-Respondent,

v.

ANTHONY M. PALERMO,
Defendant-Appellant.

Before:

HINCKS, PICKETT and MOORE, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Edward J. Dimock, *Judge.*

EARL J. MCHUGH, Assistant United States Attorney, New York City (PAUL W. WILLIAMS, United States Attorney, and CHARLES H. MILLER, Assistant United States Attorney, New York City, on the brief), *for Plaintiff-Respondent.*

WYLLYS S. NEWCOMB, New York City (ROYALL, KOEGEL, HARRIS & CASKEY, and JOHN A. WELLS, ROBERT E. FRISCH, ANDREW L. CLARK and BURTON N. BROMSON, New York City, on the brief), *for Defendant-Appellant.*

PICKETT, *Circuit Judge*:

The defendant, Anthony M. Palermo, a New York doctor, was convicted on each of three counts of an indictment charging him with wilfully attempting to evade and defeat his personal income taxes for the years 1950, 1951 and 1952, in violation of Section 145(b), Internal Revenue Code of 1939. During the course of the trial, a demand was made by the defendant for the production of a written memorandum prepared by Internal Revenue Agents sometime after a conference between them and a witness who subsequently testified for the Government at the trial.[1] The trial court denied the request on the ground that the memorandum was not of the character which was required to be produced under the provisions of Title 18, U. S. C. A., Section 3500.[2] The right of the defendant to inspect and use the memorandum is the single question presented by this appeal.

During the investigation of the defendant's income for the years in question, the Internal Revenue Agents took the sworn testimony of the accountant whose firm had prepared his tax returns. After the testimony was transcribed, the accountant again appeared before the agents to read and sign the transcript of his testimony. Some corrections were noted and an affidavit to effect the changes was made and executed. Shortly after the meeting was concluded, a memorandum of what had taken place at the meeting was prepared by the agents and placed in the Government files. It referred to the correction affidavit and stated that the witness gave further oral information in answer to ques-

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[1] The memorandum was marked "Court's Exhibit 2" and is part of the record in this Court.

[2] This section was enacted shortly after the decision of the United States Supreme Court in *Jencks* v. *United States*, 353 U. S. 657. Its purpose was to fix standards by which statements and reports of a witness in the possession of the Government should be made available to a defendant in a criminal prosecution after the witness had testified.

tions. The additional information contained in the memorandum also concerned the preparation of defendant's tax returns and related to subject matters about which the accountant later testified. A copy of the sworn testimony and the supplemental affidavit, together with the witness' testimony before the grand jury, were delivered to defendant's attorneys.

We do not agree with defendant's contention that under the provisions of Section 3500 the memorandum should have been made available to him. The term "statement," as used in the Section, refers to "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." It is quite apparent from the record that this memorandum was made from memory by one of the agents and was not intended to be a "substantially verbatim recital" of anything said by the witness. It was merely a summary of the agent's recollection of what had transpired at the meeting. The witness had not signed, adopted or approved it. It does not appear that the memorandum was a transcript of notes taken during the interview or that it purported to be a recorded verbatim recital, or nearly so, of what the witness had said. The declared purpose of the statute was "to provide for the production only of written statements previously made by a Government witness in the possession of the United States which are signed by him or otherwise adopted or approved by him, and any transcriptions or recordings of oral statements made by the witness to a Federal law officer, relating to the matter as to which the witness has testified." U. S. Code Cong. and Adm. News, 85th Congress, First Session, 1957, page 1862. This would include, we think, memoranda prepared by Government agents of oral statements made to such

agents by Government witnesses, which are shown to be a substantially verbatim recital of oral statements contemporarily recorded by the agent.[3] The evident purpose of the statute is to limit the right of inspection for use in cross-examination to reasonably accurate or authenticated statements and reports, for which the witness, not the Government agent, is responsible. The document in question does not come within this category.

The defendant further contends that, even though production of the memorandum is not required by the provisions of Section 3500, he is, under the rule of *Jencks* v. *United States*, 353 U. S. 657, entitled to have it produced for his use. In the *Jencks* case, Government witnesses who were in the employ of the United States made numerous written and oral reports to the F. B. I. concerning their activities with the Communist Party. The court held that the Government must produce for inspection all written reports of the witnesses and also the oral reports as recorded by the F. B. I., touching the events and activities to which they testified at the trial. There the Court was dealing

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[3] When the Bill was discussed on the floor of the United States Senate, the following colloquy occurred:

"Mr. Revercomb: Does the definition of 'records' which have been made or which must be produced, include memoranda made by an agent of the Government or any other statement which may have been obtained and signed?

"Mr. O'Mahoney: I think it would include a memorandum made by an agent of the Government of an oral statement made to him by a Government witness, but not by a third party. * * *

"Mr. Javits: As a practical matter, then, what has been done with the so-called records provision is to tie it down to these cases in which the agent actually purports to make a substantially verbatim recital of an oral statement that the witness has made to him—not the agent's own comments or a recording of his own ideas, but a substantially verbatim recital of an oral statement which the witness has made to him, and as transcribed by him; is that correct?

"Mr. O'Mahoney: Precisely." 103 Cong. Rec. 16488 (1957).

with written and oral reports made to superiors, by former Communists who had been employed by the United States to do undercover work. It developed after the trial that much of the testimony given by one witness was recanted as deliberately false. The broad language used by the Court [4] was interpreted differently by lower courts and by attorneys.[5] The enactment of Section 3500 followed in the wake of this decision. Although the Committee reports indicate that the legislation was "not designed to nullify, or to curb, or to limit the decision of the Supreme Court insofar as due process was concerned," or to permit the prosecution to withhold competent and relevant statements and reports which might be of value to a defendant in the cross examination of a witness, its purpose was to provide a procedure and establish the rules and conditions under which trial courts shall direct the production of statements or reports of witnesses in the possession of the United States. Without considering whether there is a conflict between the *Jencks* decision and the requirements of Section 3500, we hold that the legislation is the exclusive standard in this field and controls the procedure to be followed in

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[4] In speaking of the particular reports under consideration in the *Jencks* case, the Court said:

> "* * * We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less." (Footnote omitted) 353 U. S. 657, 668-9.

[5] For examples see U. S. Code Cong. and Adm. News, 85th Congress, First Session, 1957, pages 1862-9.

such cases.[6] Otherwise, the legislation is meaningless. *Bergman* v. *United States*, 6 Cir., 253 F. 2d 933; *Lohman* v. *United States*, 6 Cir., 251 F. 2d 951.

Affirmed.

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[6] The Committee reports on the legislation indicate that Congress looked with favor upon Chief Judge Moore's analysis of the *Jencks* decision in *United States* v. *Anderson* (E. D. Mo., 1957), 154 F. Supp. 374, 375-6, which reads as follows:

> "(1) Before the Defendant in a criminal cause is entitled to production and inspection of a statement made by a person other than himself in the possession of the United States—(a) such person must have been called as a witness by the United States, (b) the Defendant must establish on cross examination that a statement was made by such witness, (c) that such statement is in the possession of the United States, and (d) that such statement touches the events and activities related in his direct examination.
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> "(2) Such statement must either have been (a) written by the witness himself, or, (b) recorded by someone acting for the United States.
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> "Category (b) includes only continuous, narrative statements made by the witness recorded verbatim, or nearly so, by persons acting for the United States, and does not include notes made during the course of an investigation (or reports compiled therefrom) which contain the subjective impressions, opinions or conclusions of the person or persons making such notes.
>
> "(3) When any document contains material which a defendant, having made the preliminary showing set out in (1), is entitled to see, and, also contains matters which he is not privileged to see, the United States need furnish only that portion or portions, which he is entitled to see and may retain the balance."

See U. S. Code Cong. and Adm. News, 85th Congress, First Session, 1957, pages 1865-6.

Copy of Opinion in Bergman v. United States, 253 F. 2d 933, decided by the United States Court of Appeals for the Sixth Circuit on March 12, 1958, and Rehearing Denied April 23, 1958

STEWART, Circuit Judge.

Tried by jury in the district court, the appellants were convicted of violating Title 18 U. S. C. A. §§ 2314 and 2315, by receiving and transporting in interstate commerce goods which they knew had been stolen, feloniously converted or taken by fraud, and of conspiracy to violate the said criminal statutes. Upon these consolidated appeals many errors are claimed in the trial court's admission and exclusion of evidence, instructions to the jury, and other rulings.

Two principal contentions, however, emerge from the briefs and oral argument. First, it is claimed that the proof was insufficient to show that the goods which were received and transported had been obtained by any of the unlawful means referred to in the criminal statutes in question. Secondly, it is contended that in the light of Jencks v. United States, 1957, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, the district court erred in not permitting defense counsel to inspect prior statements made to the Federal Bureau of Investigation by witnesses who testified for the government.

The goods which the appellants were charged with receiving and transporting were automobile parts that in 1952 had been shipped in four separate loads from Willys-Overland Motors, Inc., to the appellant Phillip Weiss in Toledo, Ohio. Since for the reasons stated below we have concluded that the judgments must be set aside, it is unnecessary to embark upon a review of the conflicting evidence as to the circumstances under which the goods in question left the Willys-Overland plant. Suffice it to say

that while the appellants are correct in their contention that the evidence did not show that a common law larceny had been committed, such a showing was not necessary to sustain a conviction. United States v. De Normand, 2 Cir., 1945, 149 F. 2d 622; United States v. Handler, 2 Cir., 1944, 142 F. 2d 351.

The issue as to whether the goods were obtained by one of the unlawful methods of acquisition referred to in the statutes is not to be decided upon the basis of technical common law definitions. See United States v. Turley, 1957, 352 U. S. 407, 77 S. Ct. 397, 1 L. Ed. 2d 430; United States v. De Normand, supra; United States v. Handler, supra. While, of course, we cannot know whether the evidence to be produced at a new trial will be sufficient to support convictions, there is enough in the present record to prevent a determination at this time that any of the appellants are entitled to directed verdicts of acquittal. Cf. Yates v. United States, 1957, 354 U. S. 298, 332-333, 77 S. Ct. 1064, 1 L. Ed. 2d 1356.

We come then to the ground upon which we have concluded that a new trial is required. Six employees of Willys-Overland testified on behalf of the government. The general subject of their testimony related to the manner in which Phillip Weiss had secured possession of the automobile parts—a subject which was a central issue in the case. Five of these six witnesses said that they had given statements to the F. B. I. in 1952 or early in 1953 covering the subject matter of their testimony. Defense counsel made a timely demand for the production of each of the five statements for use in cross examination.

In a conscientious effort to follow the law as it then appeared to be, the trial court adopted the following principles in passing upon counsel's requests for the witnesses' prior statements: 1. If the witness had used the statement to refresh his recollection, the statement would be made available to defense counsel. 2. If the witness had not used the statement to refresh his recollection,

the court would examine the statement to determine whether its contents were inconsistent with the witness's testimony. 3. If the court determined that the statement was inconsistent with the witness's testimony the statement would be made available to defense counsel. 4. If the court found that the statement was not inconsistent with the witness's testimony the statement would not be made available to defense counsel.

Applying these standards, the court made available to the defense the prior statements of three of the government witnesses and a substantial part of the statement of a fourth. But the prior statement of one witness, Chitwood, was not turned over to defense counsel.

Several months after the judgments of conviction were entered, the Supreme Court decided Jencks v. United States, 1957, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103. In that case the Court expressly disapproved the procedure adopted by the district court here. 353 U. S. at page 669, 77 S. Ct. at page 1013. In the light of the Jencks decision, the failure of the district court to make Chitwood's prior statement available to the defense requires that the judgments be set aside.[1] We reach this conclusion with reluctance in view of the likelihood that the failure to make Chitwood's statement available actually worked no prejudice to the defendants, and in view of the generally conscientious and fair conduct of the long and complicated trial by the district judge.

Upon a second trial the recently enacted statute implementing the rule of the Jencks case will govern the procedure to be followed. 18 U. S. C. A. § 3500; Lohman v. United States, 6 Cir., 1958, 251 F. 2d 951.

The judgments are vacated and the case remanded to the district court for a new trial.

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[1] The fact that Chitwood's statement may have been unsigned is immaterial, if it was "otherwise adopted or approved by him," or, if orally made, it was a substantially verbatim contemporaneous recording. Jencks v. United States, 353 U. S. at page 668, 77 S. Ct. at page 1013; 18 U. S. C. A. § 3500.

ON PETITION FOR REHEARING

Per Curiam.

Upon consideration of the petition for rehearing, we are of opinion that it is not proper for this court to determine whether the appellants were prejudiced by failure to make available the prior statement of a witness, any more than it would be proper for the trial court to determine whether a prior statement of a witness should be turned over to defense counsel on the basis of whether the statement is inconsistent with the witness's testimony in open court.

The petition for rehearing seems to imply that the Jencks case removed this function from the district court only to place it within the province of the Court of Appeals. We are not disposed to adopt that view, and accordingly the petition for rehearing is denied.

18 U. S. C. § 3500

§ 3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified in direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject

matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85–269, Sept. 2, 1957, 71 Stat. 595.

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.